

AMENDED IN SENATE AUGUST 2, 2016

AMENDED IN SENATE JUNE 14, 2016

AMENDED IN ASSEMBLY APRIL 26, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 2316

**Introduced by Assembly Member O'Donnell
(Coauthor: Assembly Member Mullin)**

February 18, 2016

An act to amend Sections 17400 and 17406 of the Education Code, relating to school facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 2316, as amended, O'Donnell. School facilities: leasing property.

Existing law requires the governing board of a school district to adopt a resolution that, among other things: (1) declares its intention to enter into a lease or agreement relating to school property, (2) includes specified information about the property, and (3) fixes a time for a public meeting of the governing board of the school district at which sealed proposals to enter a lease or agreement with the school district will be received from any person, firm, or corporation, and considered by the governing board of the school district, as specified.

Existing law, notwithstanding the provision described above, also authorizes the governing board of a school district, without advertising for bids, to lease real property for a minimum rental of \$1 per year if the instrument by which this property is leased requires the lessee to construct, or provide for the construction of, a building to be used by the school district and provides that the title to the building shall vest in the school district at the end of the lease.

This bill would delete the language that provides that the governing board of a school district is not required to advertise for bids pursuant to this provision. The bill would require an instrument created pursuant to these provisions to be awarded based on a competitive solicitation process to the proposer providing the best value, as defined, to the school district. The bill would require the governing board of the school district to adopt and publish required procedures and guidelines for evaluating the qualifications of proposers, as provided. The bill would authorize a school district to enter into an instrument before written approval is obtained from the Department of General Services' Division of the State Architect (DSA) if the instrument provides that no work for which a contractor is required to be licensed and for which DSA approval is required shall be performed before receipt of the required DSA approval. The bill would ~~also make the bill's provisions retroactively applicable to~~ *provide, for* certain projects leased through an instrument before July 1, 2015, ~~and would specify that if at any time the instrument is later determined to be invalid, invalid by a court of competent jurisdiction because it fails to fall within the former competitive bidding exception, that the contractor who entered into the contract with the school district shall be entitled to~~ *may* be paid the reasonable cost of the labor, equipment, materials, and services furnished by the contractor before the date of the determination, ~~subject to specified conditions: if certain conditions, as determined by the court, are met.~~ The bill would authorize a school district to identify specific types of subcontractors required to be included in a proposal, and would impose specified other procedural requirements on awarding construction subcontracts of a certain value. The bill would provide that the changes made by its provisions, except the deletion of the governing board of a school district's authority to not advertise for bids, shall become inoperative on July 1, 2022.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 17400 of the Education Code is amended
- 2 to read:
- 3 17400. (a) Any school district may enter into leases and
- 4 agreements relating to real property and buildings to be used by
- 5 the school district pursuant to this article.

(b) As used in this article, the following terms have the following meanings:

(1) “Best value” means a competitive procurement process whereby the selected proposer is selected on the basis of objective criteria for evaluating the qualifications of proposers with the resulting selection representing the best combination of price and qualifications.

(2) “Best value score” means the total score awarded to a proposer for all scored evaluation factors.

(3) “Building” includes each of the following:

(A) One or more buildings located or to be located on one or more sites.

(B) The remodeling of any building located on a site to be leased pursuant to this article.

(C) Onsite and offsite facilities, utilities, or improvements that the governing board of the school district determines are necessary for the proper operation or function of the school facilities to be leased.

(D) The permanent improvement of school grounds.

(4) “Preconstruction services” means advice during the design phase including, but not limited to, scheduling, pricing, and phasing to assist the school district to design a more constructible project.

(5) “Site” includes one or more sites, and also may include any building or buildings located or to be located on a site.

SEC. 2. Section 17406 of the Education Code, as amended by Section 1 of Chapter 214 of the Statutes of 2015, is amended to read:

17406. (a) (1) Notwithstanding Section 17417, the governing board of a school district may let, for a minimum rental of one dollar (\$1) a year, to a person, firm, or corporation real property that belongs to the school district if the instrument by which this property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term of the lease, and provides that title to that building shall vest in the school district at the expiration of that term. The instrument may provide for the means or methods by which that title shall vest in the school district before the expiration of that term, and shall contain other terms and conditions as the governing board

1 of the school district may deem to be in the best interest of the
2 school district.

3 (2) An instrument created pursuant to paragraph (1) shall be
4 awarded based on a competitive solicitation process to the proposer
5 providing the best value to the school district, taking into
6 consideration the proposer's demonstrated competence and
7 professional qualifications necessary for the satisfactory
8 performance of the services required. Before awarding an
9 instrument pursuant to this section, the governing board of the
10 school district shall adopt and publish required procedures and
11 guidelines for evaluating the qualifications of proposers that ensure
12 the best value selections by the school district are conducted in a
13 fair and impartial manner. These procedures and guidelines shall
14 be mandatory for the school district when awarding an instrument
15 pursuant to this section. The required procedures shall include, at
16 a minimum, the following:

17 (A) The school district shall prepare a request for sealed
18 proposals from qualified proposers. The school district shall include
19 in the request for sealed proposals an estimate of price of the
20 project, a clear, precise description of any preconstruction services
21 that may be required and the facilities to be constructed, the key
22 elements of the instrument to be awarded, a description of the
23 format that proposals shall follow and the elements they shall
24 contain, the standards the school district will use in evaluating
25 proposals, the date on which proposals are due, and the timetable
26 the school district will follow in reviewing and evaluating
27 proposals.

28 (B) The school district shall give notice of the request for sealed
29 proposals in the manner of notice provided in Section 20112 of
30 the Public Contract Code and in a trade paper of general circulation
31 published in the county where the project is located, with the latest
32 notice published at least 10 days before the date for receipt of the
33 proposals.

34 (C) A proposer shall be prequalified in accordance with
35 subdivisions (b) to (m), inclusive, of Section 20111.6 of the Public
36 Contract Code in order to submit a proposal. If used, electrical,
37 mechanical, and plumbing subcontractors shall be subject to the
38 same prequalification requirements for prospective bidders
39 described in subdivisions (b) to (m), inclusive, of Section 20111.6
40 of the Public Contract Code, including the requirement for the

1 completion and submission of a standardized prequalification
2 questionnaire and financial statement that is verified under oath
3 and is not a public record. These prequalification requirements
4 shall be included in an instrument created pursuant to paragraph
5 (1).

6 (D) The request for sealed proposals shall identify all criteria
7 that the school district will consider in evaluating the proposals
8 and qualifications of the proposers, including relevant experience,
9 safety record, price proposal, and other factors specified by the
10 school district. The price proposal shall include, at the school
11 district's discretion, either a lump-sum price for the instrument to
12 be awarded or the proposer's proposed fee to perform the services
13 requested, including the proposer's proposed fee to perform
14 preconstruction services or any other work related to the facilities
15 to be constructed, as requested by the school district. The request
16 for proposals shall specify whether each criterion will be evaluated
17 pass-fail or will be scored as part of the best value score, and
18 whether proposers must achieve any minimum qualification score
19 for award of the instrument under this section.

20 (E) For each scored criterion, the school district shall identify
21 the methodology and rating or weighting system that will be used
22 by the school district in evaluating the criterion, including the
23 weight assigned to the criterion and any minimum acceptable score.

24 (F) Proposals shall be evaluated and the instrument awarded
25 under this section in the following manner:

26 (i) All proposals received shall be reviewed to determine those
27 that meet the format requirements and the standards specified in
28 the request for sealed proposals.

29 (ii) The school district shall evaluate the qualifications of the
30 proposers based solely upon the criteria and evaluation
31 methodology set forth in the request for sealed proposals, and shall
32 assign a best value score to each proposal. Once the evaluation is
33 complete, all responsive proposals shall be ranked from the highest
34 best value to the lowest best value to the school district.

35 (iii) The award of the instrument shall be made by the governing
36 board of the school district to the responsive proposer whose
37 proposal is determined, in writing by the governing board of the
38 school district, to be the best value to the school district.

39 (iv) If the selected proposer refuses or fails to execute the
40 tendered instrument, the governing board of the school district

1 may award the instrument to the proposer with the second highest
2 best value score if the governing board of the school district deems
3 it to be for the best interest of the school district. If the second
4 selected proposer refuses or fails to execute the tendered
5 instrument, the governing board of the school district may award
6 the instrument to the proposer with the third highest best value
7 score if the governing board of the school district deems it to be
8 for the best interest of the school district.

9 (v) Notwithstanding any other law, upon issuance of a contract
10 award, the school district shall publicly announce its award,
11 identifying the entity to which the award is made, along with a
12 statement regarding the basis of the award. The statement regarding
13 the school district's contract award and the contract file shall
14 provide sufficient information to satisfy an external audit.

15 (G) The governing board of the school district, at its discretion,
16 may reject all proposals and request new proposals.

17 (3) Following the award of an instrument created pursuant to
18 paragraph (1), and if the price proposal is not a lump sum for the
19 instrument awarded, the successful proposer shall provide the
20 school district with objectively verifiable information of its costs
21 to perform the services requested under the instrument and shall
22 select subcontractors as set forth in paragraph (4). Once any
23 preconstruction services are completed and subcontractors are
24 selected, the successful proposer and the school district shall
25 finalize the price for the services to be provided under the
26 instrument that does not exceed the price estimate in the request
27 for proposal. The contract file shall include documentation
28 sufficient to support the final price determination.

29 (4) (A) The school district, in the request for sealed proposals,
30 may identify specific types of subcontractors that must be included
31 in the proposal. All subcontractors that are identified in the
32 proposal shall be afforded the protections of the Subletting and
33 Subcontracting Fair Practices Act (Chapter 4 (commencing with
34 Section 4100) of Part 1 of Division 2 of the Public Contract Code).

35 (B) Following the award of an instrument created pursuant to
36 paragraph (1) and for subcontractors not identified in the proposal,
37 the successful proposer shall proceed as follows in awarding
38 construction subcontracts with a value exceeding one-half of 1
39 percent of the price allocable to construction work:

1 (i) Provide public notice of availability of work to be
2 subcontracted in accordance with the publication requirements
3 applicable to the competitive bidding process of the school district,
4 including a fixed date and time on which qualifications statements,
5 bids, or proposals will be due.

6 (ii) Establish reasonable qualification criteria and standards.

7 (iii) Award the subcontract either on a best value basis or to the
8 lowest responsible bidder. The process may include prequalification
9 or short-listing. The process ~~does~~ *shall* not apply to subcontractors
10 listed in the original proposal. Subcontractors awarded construction
11 subcontracts under this subdivision shall be afforded all the
12 protections of the Subletting and Subcontracting Fair Practices
13 Act (Chapter 4 (commencing with Section 4100) of Part 1 of
14 Division 2 of the Public Contract Code).

15 (5) Nothing in paragraph (2) shall preclude a school district
16 from segregating the request for proposals into a request for
17 qualifications, followed by a request for proposals with price
18 information from the proposers deemed most qualified by the
19 school district, provided that the procedures specified in paragraphs
20 (2), (3), and (4) are otherwise followed.

21 (b) Notwithstanding Sections 17297 and 17402, a school district
22 may enter into an instrument created pursuant to paragraph (1) of
23 subdivision (a) before written approval by the Department of
24 General Services' Division of the State Architect if the instrument
25 provides that no work for which a contractor is required to be
26 licensed in accordance with Article 5 (commencing with Section
27 7065) of Chapter 9 of Division 3 of the Business and Professions
28 Code and for which Division of the State Architect approval is
29 required shall be performed before receipt of the required Division
30 of the State Architect approval.

31 (c) A rental of property that complies with subdivision (a) as it
32 reads on the day that the lease is entered into shall be deemed to
33 have thereby required the payment of adequate consideration for
34 purposes of Section 6 of Article XVI of the California Constitution.

35 (d) (1) This subdivision shall apply ~~retroactively~~ to a project
36 for the construction, alteration, repair, or improvement of any
37 structure, building, or other improvement of any kind that was
38 leased through an instrument pursuant to this section before July
39 1, 2015. If at any time the instrument is determined to be invalid
40 by a court of competent ~~jurisdiction~~, *jurisdiction because it fails*

1 *to fall within the competitive bidding exception pursuant to*
2 *paragraph (1) of subdivision (a), as it read on December 31, 2016,*
3 *the contractor who entered into the instrument with the school*
4 *district shall be entitled to may be paid the reasonable cost of the*
5 *labor, equipment, materials, and services furnished by the*
6 *contractor before the date of the determination that the instrument*
7 *is invalid if all of the following—conditions conditions, as*
8 *determined by the court, are met:*

9 (A) The contractor proceeded with construction, alteration,
10 repair, or improvement based upon a good faith belief that the
11 instrument was valid.

12 (B) The school district has reasonably determined that the work
13 performed is satisfactory.

14 (C) Contractor fraud did not occur in the obtaining or
15 performance of the instrument.

16 (D) The instrument does not otherwise violate state law related
17 to the construction or leasing of public works of improvement.

18 (2) In no event shall payment to the contractor pursuant to this
19 section exceed either of the following:

20 (A) The contractor's costs as included in the instrument plus
21 the cost of any approved change orders.

22 (B) The lease payments made, less profit, at the point in time
23 the instrument is determined to be invalid by a court of competent
24 jurisdiction.

25 (3) Notwithstanding paragraph (1), this subdivision shall not
26 affect any protest and legal proceedings, whether contractual,
27 administrative, or judicial, to challenge the award of the public
28 works contract, nor affect any rights under Section 337.1 or 337.15
29 of the Code of Civil Procedure.

30 (e) This section shall become inoperative on July 1, 2022, and,
31 as of January 1, 2023, is repealed, unless a later enacted statute,
32 that becomes operative on or before January 1, 2023, deletes or
33 extends the dates on which it becomes inoperative and is repealed.

34 SEC. 3. Section 17406 of the Education Code, as added by
35 Section 2 of Chapter 408 of the Statutes of 2014, is amended to
36 read:

37 17406. (a) Notwithstanding Section 17417, the governing
38 board of a school district may let, for a minimum rental of one
39 dollar (\$1) a year, to any person, firm, or corporation any real
40 property that belongs to the school district if the instrument by

1 which this property is let requires the lessee to construct on the
2 demised premises, or provide for the construction thereon of, a
3 building or buildings for the use of the school district during the
4 term of the lease, and provides that title to that building shall vest
5 in the school district at the expiration of that term. The instrument
6 may provide for the means or methods by which that title shall
7 vest in the school district before the expiration of that term, and
8 shall contain other terms and conditions as the governing board
9 of the school district may deem to be in the best interest of the
10 school district.

11 (b) Any rental of property that complies with subdivision (a)
12 shall be deemed to have thereby required the payment of adequate
13 consideration for purposes of Section 6 of Article XVI of the
14 California Constitution.

15 (c) This section shall become operative on July 1, 2022.